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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Kimberly Miner,

Plaintiff,

v.

City of Phoenix,

Defendant.

No. 2:22-cv-00828-SMB-MTM

**PLAINTIFF'S EMERGENCY
MOTION TO REMAND FOR LACK
OF SUBJECT MATTER
JURISDICTION**

**[Oral Argument Requested]
[Expedited briefing and consideration
requested]**

Pursuant to 28 U.S.C. § 1447(c), Plaintiff hereby moves to remand this matter to the Arizona Superior Court. As the City of Phoenix's notice of removal makes clear, this Court lacks subject matter jurisdiction over this matter because the operative complaint contains no federal claims. *See* Doc. 1, p. 2, ¶¶ 2, 4, and 5. Plaintiff's proposed amended complaint, which does contain federal claims, has never been filed because the City filed its notice of removal before the state court could grant leave, or Plaintiff could file her amended complaint.

The relevant facts are as follows. On May 13, 2021, Plaintiff filed her complaint in state court asserting only state law claims against the City of Phoenix. On May 6, 2022, Plaintiff moved to amend her complaint to add additional defendants—two police officers—and federal claims against the City and the two officers. Doc. 1-1, at p. 65. Defendant City of Phoenix and Plaintiff agreed to stipulate to the amendment if Plaintiff

1 would not object to removal,¹ and on May 11, 2022, the parties filed their stipulation. Doc.
2 1-1, at p. 80. The next day, before the state court could rule on the stipulation and before
3 Plaintiff could file her amended complaint, Defendant City of Phoenix filed its notice of
4 removal. Doc. 1.

5 The City's notice of removal stripped the state court of jurisdiction. As a result, the
6 state court can never grant the stipulation to allow for the filing of the amended complaint.
7 Because the amended complaint can never be filed, it can never be served on the individual
8 defendants named in the amended complaint.

9 Other courts in this district have determined that in this situation, they lack federal
10 subject matter jurisdiction, and that the only solution is remand. *See Fesko v. Equiant Fin.*
11 *Servs. Inc.*, No. CV-19-01366-PHX-DWL, 2019 WL 1915617, at *2 (D. Ariz. Apr. 30,
12 2019) (holding under similar circumstances that "[t]he Court has no choice but to remand
13 this action to state court."); *U.S. Bank Nat'l Ass'n v. Starr Pass Resort Devs., LLC*, No. CV
14 12-519-TUC-FRZ, 2012 WL 13026921, at *2 (D. Ariz. Sept. 5, 2012) ("a case is not
15 removable until a state court actually grants the motion to file a proposed amended
16 complaint that forms the basis for federal jurisdiction.")

17 In *Fesko*, as here, the Defendant removed a state court matter after a motion to
18 amend a complaint to add federal claims had been filed, but before the motion had been
19 granted or the amended complaint had been filed. Judge Lanza determined that he lacked
20 jurisdiction to hear the case and ordered it remanded. In *U.S. Bank*, Judge Zapata reached
21 the same result in a diversity case where the Plaintiff sought amendment of her complaint to
22 add damages claims and the defendant removed to federal court before leave had been
23

24
25 ¹ Plaintiff agreed not to object to a timely and proper removal, which did not happen.
26 Plaintiff did not, and legally could not, agree to waive the issue of subject matter
27 jurisdiction. *See Kuhlmann v. Sabal Fin. Grp. LP*, 26 F. Supp. 3d 1040, 1050 (W.D. Wash.
28 2014) ("Doctrines of waiver, estoppel, and equitable tolling do not apply to subject matter
jurisdiction requirements, and a lack of subject matter jurisdiction can be raised at any time,
even by the Court.")

1 given to file the amendment. Judge Zapata determined that he lacked jurisdiction and
2 remanded the case.

3 Both *Fesko* and *U.S. Bank* held that a case was not removable based solely on a
4 proposed amendment to a complaint. The action that triggers removal is the filing of the
5 amended complaint itself.

6 Plaintiff has been unable to locate any case in this district holding that removal is
7 proper before an amended complaint has been filed. In *Beauregard v. Agro-Jal Farming*
8 *Enters.*, 2016 U.S. Dist. LEXIS 23076 *, No. CV-15-02397-PHX-JJT (D. Ariz. Feb. 25,
9 2016, the court held that the time for removal of a diversity action was triggered by a
10 stipulation to dismiss a non-diverse defendant and not by the later order that dismissed the
11 defendant. As a result of that determination, the court remanded the case to state court as
12 untimely removed. *Beauregard* does not address the question of whether a proposed
13 amended complaint triggers removal.

14 Before filing this motion, Plaintiff repeatedly advised the City's attorneys that their
15 removal was improper. Plaintiff provided the City with a stipulation to remand, which the
16 City rejected. Plaintiff then provided the City with a proposed joint motion to determine
17 jurisdiction. The City rejected that as well.

18 Plaintiff's concern in raising this issue is that "[i]n this action, as in all actions before
19 a federal court, the necessary and constitutional predicate for any decision is a
20 determination that the court has jurisdiction—that is the power—to adjudicate the dispute...
21 If that power is missing, however, the court is not in a position to act and its decisions
22 cannot generally be enforced." *Toumajian v. Frailey*, 135 F.3d 648, 652–53 (9th Cir. 1998).
23 If there is a defect in this Court's jurisdiction, any subsequent ruling or disposition in this
24 matter would most likely be a nullity. Absent jurisdiction, every effort that the parties or the
25 Court expend on this matter will be wasted.

26 Because it is apparent on the face of the notice of removal that there is no
27 jurisdiction, the Court should issue its order remanding this matter to state court.

28

1 Further, Plaintiff requests that this motion be given expedited or emergency
2 consideration. Because of the City's untimely removal, Plaintiff's amended complaint sits
3 in legal limbo. It cannot be filed and it cannot be served. The statute of limitation for
4 Plaintiff's federal claims runs on May 30, 2022. If the case is not remanded before that
5 date, Plaintiff may be forced to file a new lawsuit in order to preserve those claims and may
6 incur costs that she should never have incurred.

7 Finally, Plaintiff requests that she be awarded her fees and costs incurred in seeking
8 remand.

9 RESPECTFULLY SUBMITTED: May 18, 2022

10 **ROBBINS & CURTIN, P.L.L.C.**

11 By: /s/ Jesse M. Showalter
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17 **CERTIFICATE OF SERVICE**

18 I hereby certify that on May 18, 2022, I electronically transmitted the attached
19 document to the Clerk's Office using the CM/ECF system for filing and transmittal of a
20 Notice of Electronic Filing to the following CM/ECF registrants:

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